

9 FAM 40.34 NOTES

(CT:VISA-681; 02-01-2005)
(Office of Origin: CA/VO/L/R)

9 FAM 40.34 N1 BACKGROUND AND SUMMARY OF INA 212(A)(3)(D)

(CT:VISA-678; 01-25-2005)

The Immigration Act of 1990 created INA 212(a)(3)(D), which significantly amended and supplanted former INA 212(a)(28)(C). INA section 212(a)(3)(D) is a refusal category that applies only to immigrant visa applications. The major elements of section 212(a)(3)(D) are as follow:

- (1) Immigrant visa applicants who are or have been members of, or are affiliated with the Communist party or proscribed domestic or foreign organizations, are inadmissible unless the membership or affiliation terminated either two years before the date of visa application, or five years before the date of visa application in the case of an alien whose membership or affiliation with a party controlling a totalitarian dictatorship;
- (2) Relief is available for aliens whose association with a proscribed organization is or was non-meaningful;
- (3) An exception is provided for immigrants whose membership or affiliation is or was involuntary, under the age of 16, by operation of law, or to provide the essentials of living;
- (4) The Department of Homeland Security (DHS) may waive ineligibility for immigrant visa applicants who have the requisite family relationship with a U.S. citizen or permanent resident alien for humanitarian purposes.

9 FAM 40.34 N2 DETERMINING INELIGIBILITY UNDER INA 212(A)(3)(D)

(TL:VISA-77; 3-30-93)

In determining possible ineligibility under INA 212(a)(3)(D), the consular officer should first establish whether the immigrant alien was a member or affiliate of a proscribed organization (see 9 FAM 40.34 N3 below). If such association is found to exist, the question of whether the membership or affiliation was terminated at least two (or in some cases, five) years ago should be examined (see 9 FAM 40.34 N4 below). Only if the membership or affiliation continued to a point within the two or five year period will it be necessary to consider whether the association may have been non-meaningful or non-voluntary (see 9 FAM 40.34 N5 and 9 FAM 40.34 N6 below), or whether the alien is entitled to seek an individual waiver under INA 212(a)(3)(D)(iv) (see 9 FAM 40.34 N8 below).

9 FAM 40.34 N3 IMMIGRANT MEMBERS OR AFFILIATES OF PROSCRIBED ORGANIZATIONS INADMISSABLE

(CT:VISA-678; 01-25-2005)

An immigrant visa applicant who is or has been a member of, or affiliated with, the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible under INA 212(a)(3)(D) unless qualifying for one of the exceptions described in 9 FAM 40.34 N4 through 9 FAM 40.34 N6 below. Nonimmigrants are not subject to the provisions of INA 212(a)(3)(D).

9 FAM 40.34 N3.1 Proscribed Organizations

(TL:VISA-207; 09-19-2000)

The term "proscribed organization" means any group that falls within the purview of INA 212(a)(3)(D). A member or affiliate of a proscribed organization is ineligible for an immigrant visa unless he or she qualifies for relief.

9 FAM 40.34 N3.2 Application to Non-communist

Totalitarian Parties

(CT:VISA-678; 01-25-2005)

As indicated in 22 CFR 40.34(f), the definition of totalitarian party contained in INA 101(a)(37), a former or present voluntary member of, or an alien who was, or is voluntarily affiliated with a noncommunist party, organization, or group, branch, affiliate, or subdivision thereof, during the time of existence did not or does not prescribe or advocates the establishment of totalitarian dictatorship in the United States, is not considered ineligible under INA 212(a)(3)(D) to receive a visa.

9 FAM 40.34 N3.3 Adjudicating Membership In or Affiliation With Proscribed Organization

9 FAM 40.34 N3.3-1 Consular Officer's Responsibility

(TL:VISA-207; 09-19-2000)

Membership or affiliation is a question of fact for the consular officer to determine. All sources of information should be utilized in making this judgment (see 9 FAM 40.34 N3.3-2 below). Where there are discrepancies between the record and the alien's statements, every effort should be made to resolve the factual issues locally. Any questions that cannot be adjudicated at post regarding the alien's association should be submitted for the Department's advisory opinion (see section 9 FAM 40.34 PN1).

9 FAM 40.34 N3.3-2 Sources of Information

(CT:VISA-678; 01-25-2005)

A finding of ineligibility under INA 212(a)(3)(D) may be based upon evidence available through:

- (1) The visa application;
- (2) The applicant's statements;
- (3) The result of name checks or the Department's security advisory opinion (when applicable); and

- (4) A check of post files, CLASS, or Independent Name Check (INC), or any other outside information available.

9 FAM 40.34 N3.3-3 Applicants Required to Divulge Memberships

(CT:VISA-678; 01-25-2005)

INA 222(a) requires immigrant visa applicants to respond to questions on the visa application:

- (1) Applicant's full and true name, any other name which he or she has used or by which he or she has been known;
- (2) Age and sex;
- (3) Date and place of birth; and
- (4) Additional information necessary to identify the applicant (e.g., organizational memberships).

If an applicant fails to do so, the consular officer should ask him or her those questions.

9 FAM 40.34 N3.4 Definition of Affiliate

(CT:VISA-678; 01-25-2005)

The term affiliate as used in INA 212(a)(3)(D) an organization related to, or identified with, a proscribed party or association, including subsidiary, branch, or subdivision thereof, as to evidence adherence to or furtherance of the purposes and objectives of such association or party.

9 FAM 40.34 N3.4-1 Defining Affiliation

(CT:VISA-678; 01-25-2005)

INA 101(e)(2) states: "The giving, loaning or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation."

9 FAM 40.34 N3.4-2 Affiliation Requires Positive Action

(TL:VISA-207; 09-19-2000)

A mere intellectual interest in, sympathy for, or favoring the ideologies of the Communist or other totalitarian party does not constitute affiliation with such an organization unless accompanied by some positive and voluntary action that provides support, money, or another thing of value.

9 FAM 40.34 N3.5 Government Workers in Communist and Communist-Controlled Countries

9 FAM 40.34 N3.5-1 Responsible Position With Communist Government Generally Constitutes Affiliation

(TL:VISA-207; 09-19-2000)

As stated in 22 CFR 40.34(c), voluntary service in a political capacity constitutes affiliation. Employment in a responsible position in the government of a communist or communist-controlled country generally constitutes grounds for a finding of ineligibility under INA 212(a)(3)(D). This presupposition of ineligibility, however, may be rebutted by the presentation of credible evidence that would bring the case within the exceptions discussed in 9 FAM 40.34 N4 through 9 FAM 40.34 N6 below.

9 FAM 40.34 N3.5-2 Rank and File Government Workers Not Presupposed Ineligible

(TL:VISA-77; 3-30-93)

Rank-and-file government workers in communist and communist-controlled countries, including those employed in the information media, are not presupposed to be ineligible under INA 212(a)(3)(D). Their cases should be evaluated on the same basis as all other immigrant visa applicants.

9 FAM 40.34 N3.5-3 Type of Passport May Indicate Nature of Position

(TL:VISA-77; 3-30-93)

One criterion for determining the nature of an alien's position is the type of passport he or she holds. Possession of a diplomatic, special, or service passport issued by a communist or communist-controlled country, while not conclusive, raises the probability of communist membership or affiliation and should be the subject of further inquiry and/or investigation.

9 FAM 40.34 N3.5-4 Consular Post in Alien's Home Country Consulted

(TL:VISA-77; 3-30-93)

U.S. consular posts in the alien's country of nationality have the best perspective on whether an alien's government employment constitutes sufficient grounds for a finding of ineligibility. Therefore, in third-country cases, consular officers must consult with the appropriate U.S. post in the alien's home country prior to taking final action on the visa application and should ordinarily defer to the opinion of the consular officer at that post.

9 FAM 40.34 N3.6 Service in Armed Forces of Communist or Communist-controlled Countries

(TL:VISA-77; 3-30-93)

As indicated in 22 CFR 40.34(b), service in the armed forces of any country, whether voluntary or not, does not by itself establish an alien's membership in or affiliation with a proscribed organization, nor does it constitute a ground of ineligibility to receive a visa. However, continuing service and/or promotion to a higher rank, e.g., the officer corps, could result in the alien's serving in a political capacity which would be cause for a finding of ineligibility under INA 212(a)(3)(D).

9 FAM 40.34 N3.7 Aliens Previously Presumed Ineligible

(TL:VISA-77; 3-30-93)

In the past, nonimmigrant aliens were often presumed to be ineligible under former INA 212(a)(28)(C) based on factors in the applicant's case which indicated possible communist membership or affiliation (e.g., type of passport carried, nature of employment). These presumptive findings were always made without the benefit of a personal interview. Consular officers shall adjudicate such cases anew during the immigrant visa interview, giving the alien every opportunity to rebut the previous presumptive finding of ineligibility.

9 FAM 40.34 N4 RELIEF FOR PAST MEMBERSHIP

(TL:VISA-85; 10-1-93)

- a. INA 212(a)(3)(D)(iii) relieves an alien of visa ineligibility if his or her membership or affiliation terminated at least:
 - (1) Two years before the date of application for a visa or for admission; or
 - (2) Five years before the date of application for a visa or for admission in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of the date of application.
- b. This exception does not apply if it is determined that the alien is a threat to the security of the United States. It should be noted, however, that this issue will normally only arise if there is also a question of possible ineligibility under INA sections 212(a)(3)(A) or (B).

9 FAM 40.34 N4.1 Active Opposition No Longer Required

(TL:VISA-77; 3-30-93)

The previous requirement for a showing of active opposition to communism as a condition for relief from visa ineligibility was eliminated by the Immigration Act of 1990. Mere termination of membership or affiliation for the requisite time period now suffices to provide relief under INA 212(a)(3)(D)(iii).

9 FAM 40.34 N4.2 Credible Assertion of Termination Usually Sufficient

(TL:VISA-77; 3-30-93)

If an alien admits a past membership or affiliation but asserts credibly that the membership or affiliation was terminated two (or in some cases, five) or more years ago, the consular officer should accept the assertion at face value. The consular officer should reject the alien's assertion only if the officer has controverting evidence or has another articulable reason for doing so.

9 FAM 40.34 N4.3 Pleading in the Alternative

(TL:VISA-77; 3-30-93)

There may be cases in which classified information (which cannot be disclosed to the alien) gives reason to believe that, at some time in the past, the alien was a member or affiliate of a communist organization, despite his or her denial that such association occurred. In such cases, the alien may elect to "plead in the alternative"—i.e., deny any membership or affiliation at any time, but at the same time assert that, at a minimum, there has been no such membership or affiliation within the statutory two-year or five-year period. All such cases require the Department's advisory opinion (see 9 FAM 40.34 N4.4 below).

9 FAM 40.34 N4.4 Security Advisory Opinions in Past Membership Cases

(CT:VISA-678; 01-25-2005)

- a. The Department's security advisory opinion (see section 9 FAM 40.34 PN1) is required prior to visa issuance in any past membership case in which the:
 - (1) Consular officer has information indicating that the claimed termination of membership did not, in fact, occur;
 - (2) Consular officer has reason to believe the alien may be a threat to the security of the United States; or
 - (3) Alien elects to "plead in the alternative" as described in 9 FAM 40.34 N4.3 above.
- b. All other cases involving relief under INA 212(a)(3)(D)(iii) may be adjudicated by the consular officer without reference to the Department.

9 FAM 40.34 N5 RELIEF FOR NON-MEANINGFUL ASSOCIATION

(TL:VISA-77; 3-30-93)

- a. Non-meaningful membership or affiliation has never been codified in the INA, but is rather a judicially-created concept. It does, however, afford relief from ineligibility in appropriate cases.
- b. For advisory opinion requirements in non-meaningful association cases, (see 9 FAM 40.34 N7 below.)

9 FAM 40.34 N5.1 Illustrative Cases

(TL:VISA-207; 09-19-2000)

In the illustrative cases which follow, it was held that membership or affiliation in a proscribed organization did not constitute a meaningful association. In each case, the alien had not had a commitment to the political and ideological convictions of communism.

- (1) The Supreme Court held in *Rowoldt v. Perfetto* (355 U.S. 115, 1957) that an alien's connection with a proscribed organization must constitute a meaningful association, and that membership was not present when the dominating impulse to the affiliation was wholly devoid of any political implications. This modified the ruling in *Galvan v. Press* (347 U.S. 522, 1954) that membership was present if there is a substantial basis for finding that an alien

consciously committed himself or herself to the Communist Party by joining an organization known as the Communist Party which operates as a distinct and active political organization.

- (2) The Supreme Court in *Gastelum-Quinones v. Kennedy* (374 U.S. 469, 1963) cited the *Galvan* and *Rowoldt* decisions with approval and held that membership was not present if the alien, during the association with the proscribed organization, was not aware of its nature as a political organization, and that even participation in the organization's activities would not constitute membership unless the participation would substantially support the inference of awareness of the political aspects of the organization.
- (3) Membership is not present if it is proven that the alien joined accidentally, artificially, or unconsciously, or in appearance only. (*Colyer v. Skeffington*, 265 Fed. 17, 72, 1920)
- (4) Membership is not present if it is established that the alien joined an affiliate of the Communist Party, or a subdivision thereof, when the alien had no knowledge of the relationship of the affiliate to the Communist Party or its subdivisions. (In the Matter of C-6 I&N Dec. 20; approved by the Attorney General, March 14, 1955.)

9 FAM 40.34 N5.2 Membership Without Knowledge or Consent

(TL:VISA-77; 3-30-93)

Membership is not present if the alien establishes enrollment as a member without his or her knowledge or consent.

9 FAM 40.34 N5.3 Membership for Anti-communist Intelligence Purposes

(TL:VISA-1; 8-30-87)

Membership is not present if it is established that the alien joined a proscribed organization for intelligence purposes at the behest of a friendly security agency or an anti-communist group, or that the alien joined the organization solely to combat communist control and to carry on anti-communist activities within the organization.

9 FAM 40.34 N6 RELIEF FOR NON-

VOLUNTARY ASSOCIATION

(CT:VISA-678; 01-25-2005)

- a. INA 212(a)(3)(D)(ii) provides that a membership or affiliation that would otherwise render an alien ineligible under INA 212(a)(3)(D) will not do so if the membership or affiliation is or was:
 - (1) Involuntary (see 9 FAM 40.34 N6.1 below);
 - (2) Solely when the alien was under 16 years of age (see 9 FAM 40.34 N6.2 below);
 - (3) Solely by operation of law (see 9 FAM 40.34 N6.3 below); or
 - (4) Solely for the purpose of obtaining employment, food rations, or other essentials of living (see 9 FAM 40.34 N6.4 below).
- b. For security advisory opinion requirements in non-voluntary association cases, (see 9 FAM 40.34 N7 below).

9 FAM 40.34 N6.1 Involuntary Membership

(TL:VISA-207; 09-19-2000)

Membership or affiliation is involuntary when it is the result of such factors as fraud, duress, coercion, incapacity, or error which impair or negate the capacity for affirmative and intentional action. A common example is when police repression or the threat and/or use of political or economic sanctions compels membership in the party or an affiliate organization. The burden is on the alien to establish that the association was involuntary. The alien's credibility is enhanced if membership or affiliation is or was nominal and without active participation in the affairs of the proscribed organization, other than periodic payment of dues and/or attendance at required meetings of the organization.

9 FAM 40.34 N6.2 Membership While Under 16 Years of Age

(TL:VISA-77; 3-30-93)

If an immigrant applicant's membership or affiliation occurred prior to the age of 16, the relief provided by INA 212(a)(3)(D)(ii) applies. The alien's activities and/or continuing commitment to communism after 16 years of age, however, are not covered by this exception.

9 FAM 40.34 N6.3 Membership Solely by Operation of Law

(CT:VISA-678; 01-25-2005)

Membership solely by operation of law is considered to include any case wherein the alien automatically, and without personal acquiescence, became a member of or affiliated with a proscribed party or organization resulted from an official act, proclamation, order, or decree.

9 FAM 40.34 N6.4 Membership for Purposes of Obtaining Essentials of Living

(TL:VISA-77; 3-30-93)

- a. In the absence of an ideological commitment to communism, membership or affiliation established for the purpose of obtaining the various physical essentials of living falls within the exemptions of INA 212(a)(3)(D)(ii).
- b. The phrase "essentials of living" refers to a minimum standard of civilized life and not simply to mere continued survival. It includes but is not limited to housing, food rations, employment, medical and dental care, clothing, furnishings, transportation, and education.

9 FAM 40.34 N6.4-1 Membership to Obtain or Continue Higher Education

(TL:VISA-77; 3-30-93)

An alien whose membership was nominal and who does not appear to have subscribed to communist ideology may be considered to fall within the purview of INA 212(a)(3)(D)(ii) if he or she joined for one or more of the following reasons:

- (1) Membership was a prerequisite for admission to a university or other advanced school; or
- (2) Although membership was not a prerequisite for admission to a university or other advanced school, membership was necessary for the alien to continue his or her studies; or
- (3) Membership was necessary to obtain academic benefits such as scholarships, dormitory accommodations, food rations, reduced transportation fares, etc.

9 FAM 40.34 N6.4-2 Membership for Employment

(TL:VISA-77; 3-30-93)

Aliens who joined communist organizations solely for the purpose of obtaining, retaining, changing, or advancing in employment commensurate with their educational background and experience, whose memberships were nominal, and who do not appear to have subscribed to communist ideology, may be considered to be within the purview of INA 212(a)(3)(D)(ii).

9 FAM 40.34 N6.5 Non-voluntary Membership Usually Occurs in Communist Countries

(TL:VISA-77; 3-30-93)

Membership or affiliation falling within the purview of INA 212(a)(3)(D)(ii) is usually found to occur in a communist or communist-controlled country. While it is possible for such association to happen in noncommunist countries, it is substantially more difficult to establish.

9 FAM 40.34 N6.6 Membership in Mass Organizations

(TL:VISA-77; 3-30-93)

Membership in a mass organization in a communist or communist-controlled country may come under INA 212(a)(3)(D)(ii) if:

- (1) The membership meets one or a combination of the criteria listed in 9 FAM 40.34 N6 above;
- (2) It is shown that there was no ideological commitment to communism; and
- (3) The membership was of a mere rank-and-file nature without active participation in the activities of the organization.

9 FAM 40.34 N7 SECURITY ADVISORY OPINIONS (SAO) AND CLEARANCES IN NON-MEANINGFUL AND NON-VOLUNTARY ASSOCIATION CASES

9 FAM 40.34 N7.1 Cases Which Require Advisory Opinions

(CT:VISA-678; 01-25-2005)

Consular officers must request the Department's security advisory opinion (see 9 FAM 40.34 PN1) in all cases involving claimed non-meaningful or non-voluntary membership by nationals of Cuba, Laos, North Korea, the People's Republic of China, and Vietnam who are, or were during the past five years, members of the Communist Party. Posts should also seek a security advisory opinion (SAO) in any case in which an alien's claim to non-meaningful or non-voluntary association is questionable. When an SAO has been requested, no visa may be issued until the Department's response has been received.

9 FAM 40.34 N7.2 Cases Not Requiring Advisory Opinions

(CT:VISA-678; 01-25-2005)

Consular officers may determine the existence of non-meaningful or non-voluntary association without reference to the Department in all cases other than those indicated in 9 FAM 40.34 N7.1 above, including those involving nationals of Cuba, Laos, North Korea, the People's Republic of China, and Vietnam who are, or were during the past five years or more, affiliates of the Communist Party or members or affiliates of organizations affiliated with the Communist Party.

9 FAM 40.34 N7.3 Clearances for Third-Country Applicants

(CT:VISA-681; 02-01-2005)

When an alien is applying in a country other than that in which the claimed non-meaningful or non-voluntary association occurred, consular officers should consult with, and obtain a clearance from, the appropriate post prior to visa issuance. (*See Reciprocity Schedule.*)

9 FAM 40.34 N8 WAIVER OF INELIGIBILITY UNDER INA 212(A)(3)(D)(IV)

(CT:VISA-678; 01-25-2005)

- a. An immigrant alien who is ineligible for a visa under INA 212(a)(3)(D) may seek a waiver of ineligibility from the Department of Homeland Security (DHS) under INA 212(a)(3)(D)(iv) if he or she is the parent, spouse, son, daughter, brother, or sister of a U.S. citizen, or the spouse, son, or daughter of a lawful permanent resident. A waiver of ineligibility may not be granted to an alien who is a threat to the security of the United States.
- b. INA 212(a)(3)(D)(iv) waiver applications should be processed in accordance with the procedures described in 9 FAM 40.34 PN3.